Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1317

A&M RECORDS, INC., TRANSAMERICA CORP., UNITED ARTISTS CORP., UNITED ARTISTS RECORDS, INC., ERIC-MAINLAND DISTRIBUTING CO., MUSICAL ISLE OF AMERICA, RECORD MERCHANDISING COMPANY, INC., JEROME S. MOSS, ROBERT FEAD and SIDNEY TALMADGE,

Petitioners,

vs.

JACK SOLINGER,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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No. .....

A&M RECORDS, INC., TRANSAMERICA CORP., UNITED ARTISTS CORP., UNITED ARTISTS RECORDS, INC., ERIC-MAINLAND DISTRIBUTING CO., MUSICAL ISLE OF AMERICA, RECORD MERCHANDISING COMPANY, INC., JEROME S. MOSS, ROBERT FEAD and SIDNEY TALMADGE,

Petitioners,

vs.

JACK SOLINGER,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners A&M Records, Inc., Transamerica Corp., United Artists Corp., United Artists Records, Inc., Eric-Mainland Distributing Co., Musical Isle of America, Record Merchandising Company, Inc., Jerome S. Moss, Robert Fead, and Sidney Talmadge respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 27, 1978.

Opinion Below.

The opinion of the Court of Appeals is reported at 586 F.2d 1304 (9th Cir. 1978), and is reprinted in the Appendix to this petition at page A-1. No

opinion was rendered by the District Court for the Northern District of California.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 27, 1978 and this petition was filed within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. section 1254(1).

Questions Presented.

1. Whether a person who engaged in negotiations to purchase but did not purchase an existing business which was the alleged target of anticompetitive acts has standing to sue under section 4 of the Clayton Act for lost prospective profits of that business.

2. Whether standing to sue under section 4 of the Clayton Act is a question of law which may be determined by the court at a preliminary stage, or a question of fact for the jury.

Statutory Provisions Involved.

United States Code, Title 15, section 15 [section 4 of the Clayton Act]:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Statement of the Case.

A. The Parties.

Respondent Jack Solinger ("Solinger"), plaintiff below, is the former president and general manager of Independent Music Sales ("IMS"), an independent record distributor. Petitioners,* defendants below, are: A&M Records, Inc. ("A&M"), a record company engaged in the manufacture and sale of records and tapes; Robert Fead and Jerome S. Moss, officers of A&M; Record Merchandising Company and Eric-Mainland Distributing Co. (Eric-Mainland"), independent record distributors; Sidney Talmadge, an officer of Record Merchandising Company; and Transamerica Corp., United Artists Corp., United Artists Records, Inc., and Musical Isle of America, which, along with Eric-Mainland, were all parent, subsidiary or affiliate corporations of one another (collectively referred to herein as the "Transamerica Group").

B. Statement of Facts.

Solinger is the former president and general manager of IMS, an independent distributor of phonograph records and tape recordings located in northern California. As an independent distributor, IMS was appointed by various record and tape manufacturers, including A&M and Motown, to distribute their phonograph records and tape recordings.

For several years while he was the president of IMS, Solinger had engaged in negotiations for the purchase of IMS with H. R. Basford Company ("Basford"), the owner of IMS. In 1972 Zenith Distributing

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*Motown Record Corporation ("Motown"), also a defendant below, has filed a separate Petition for Writ of Certiorari with this Court.

Company of Northern California ("Zenith") purchased all of the outstanding stock of Basford. Thereafter, Solinger negotiated with Zenith for the purchase of IMS. These negotiations resulted in Solinger obtaining two separate options to purchase IMS, neither of which he exercised and which lapsed because Solinger did not find them financially attractive.

In mid-January, 1973, according to Solinger's allegations, two proposed written agreements were prepared. One was an agreement between Zenith as "SELLER", J.N.S. Enterprises, Inc. ("JNS Enterprises"), as "BUYER", and Solinger as "GUARANTOR". Under the terms of this agreement, JNS Enterprises agreed to purchase and Zenith agreed to sell to JNS Enterprises all of the outstanding shares of capital stock of IMS. JNS Enterprises was never formed by Solinger and the proposed agreement was never executed by any of the prospective parties. The second proposed agreement was a lease for warehouse space. It, too, was never executed by any of the prospective parties.

According to Solinger, he was "prevented" from acquiring IMS because A&M and Motown refused to continue with IMS as its distributor in the event the contemplated purchase was consummated, which refusal caused Solinger to decline to sign the agreement of sale. Solinger contends that A&M and Motown shortly thereafter terminated IMS as a distributor and, without these two suppliers, IMS went out of business.

Solinger further alleges that: in violation of sections 1 and 2 of the Sherman Act, A&M and Motown refused to deal with him and with IMS because, pursuant to his specific directions as president, IMS had refused to comply with a territorial allocation plan

established by A&M and Motown under which northern and southern California were divided into two separate territories; after A&M and Motown terminated their distribution agreements with IMS, Eric-Mainland became the distributor for both A&M and Motown products in northern California and began to comply with a territorial allocation plan under which it would not sell A&M and Motown products in southern California; and the Transamerica Group engaged in a series of improper acquisitions that resulted in a lessening of competition in and substantial injury to the "independent distribution of popular recorded music" industry in violation of section 7 of the Clayton Act and section 2 of the Sherman Act.

Based upon these allegations, Solinger sought damages for the profits he would have obtained if he had purchased IMS and if it had continued in operation and for the salary he would have received as president of IMS.

C. Decisions of the Courts Below.

Each of the defendants filed motions to dismiss the complaint on the ground that Solinger lacked standing under section 4 of the Clayton Act. In opposing these motions, Solinger submitted his own affidavits which explained the factual basis for his assertion of standing. The district court granted the motions to dismiss and denied a motion for reconsideration made by Solinger, stating that Solinger "may have some kind of other cause of action against those people, but it is not, as far as I am concerned, an antitrust action."*

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*In fact, Solinger has pending a state court action based upon the same allegations as his federal complaint.

Solinger appealed to the Ninth Circuit Court of Appeals. The Court of Appeals held, in essence, that Solinger did not have standing as an employee of IMS to assert the claims alleged in the complaint and did not have standing under any theory to assert his claim under section 7 of the Clayton Act since he was not a "member of the competitive infrastructure" in the record industry. However, the court reversed the remainder of the district court's ruling and held that Solinger could have standing to assert his claims under the Sherman Act for lost *prospective* profits of IMS because he had engaged in negotiations for the purchase of IMS from its owner, even though Solinger never signed an agreement of purchase, spent any money, or otherwise acquired any legally cognizable interest in IMS.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Conflicts With the Decisions of Other Courts of Appeals as to Whether a Person Who Does Not Have "Business or Property" Within the Meaning of Section 4 of the Clayton Act Nevertheless Has Standing to Sue for Purported Antitrust Violations Merely Because He Engaged in Negotiations to Purchase a Business.

The Court of Appeals held that a plaintiff in an antitrust treble damage action may meet the "business or property" standing requirement of section 4 of the Clayton Act by proving that he was a "prospective purchaser" of a business. In so holding, the court expressly recognized that its decision was in conflict with that of other courts, in particular the decision of the Eighth Circuit Court of Appeals in *Duff v. Kansas City Star Co.*, 299 F.2d 320, 323 (8th Cir. 1962). 586 F.2d at 1309; Appendix at A-8.

In *Duff v. Kansas City Star Co., supra,* a former newspaper publisher brought an action against newspaper publishing companies alleging a monopolization of the newspaper publishing business in the Kansas City area. Plaintiff asserted that he had the desire to reenter the newspaper publishing business after an absence and had taken certain steps to prepare for that reentry. The court rejected plaintiff's contention that he could bring an action for damages under the antitrust laws for "loss of anticipated profits in an anticipated business", 299 F.2d at 323, and held that only one who has suffered damages to an actual, existing business may sue for damages under section 4 of the Clayton Act. The Seventh Circuit Court of Appeals has reached the same conclusion. *Peller v.*

International Boxing Club, 227 F.2d 593, 595 (7th Cir. 1955). *See also, Brownlee v. Malco Theatres*, 99 F.Supp. 312, 317 (W.D. Ark. 1951).

Faced with the same contention, the Court of Appeals held that a prospective purchaser of a business who has taken "substantial demonstrable steps to enter a business" may sue for damages done to the business that he hoped and intended to purchase. 586 F.2d at 1309; Appendix at A-8-9. In so holding, the court refused to follow the rule of *Duff v. Kansas City Star Co.* and instead adopted the so-called "intention and preparedness" test as set forth by the court in *Waldron v. British Petroleum Co.*, 231 F.Supp. 72 (S.D.N.Y. 1964). Pursuant to this test, the trier of fact is called upon to determine if a plaintiff who does not have an actual business or property interest nevertheless has standing to sue for damages for alleged antitrust violations by showing that he had sufficient intention and preparedness to acquire such a business. A few other circuit courts of appeals appear to concur in this view. *See, Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 395-96 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); *Triangle Conduit & Cable Co. v. National Electric Products Corp.*, 152 F.2d 398, 400 (3d Cir. 1945); *American Banana Co. v. United Fruit Co.*, 166 F. 261, 264 (2d Cir. 1908). It should be noted, however, that those courts which have actually held that a plaintiff had standing because of his "intention and preparedness" to engage in a business did so where the plaintiff's interests had "materialized sufficiently to constitute an asset of reasonably determinate value which might, for example, be bought and sold or taxed, and which is capable of being appraised." L. Sullivan, *Handbook*

of the Law of Antitrust §247 at 772 (West 1977) (footnote omitted). The decision of the Court of Appeals allows standing to a plaintiff with no such "materialized" interest and thus goes much further than any of those other decisions.

Petitioners contend that the holding of the Eighth Circuit in *Duff v. Kansas City Star Co., supra,* is correct and that a plaintiff can only have standing to sue for damages under section 4 of the Clayton Act if he can show injury to an actual, existing business. In the absence of persuasive reasons to the contrary, statutory language should be read in the most straightforward, natural way, giving words appearing therein their ordinary meaning. *Banks v. Chicago Grain Trimmers Ass'n,* 390 U.S. 459, 465 (1968). The only natural reading of the words "business or property" is that they mean an actual, existing business. *See Burns v. Alcala,* 420 U.S. 575 (1975) (holding that term "dependent child" in Social Security Act means actual existing child and does not include unborn child; similarly, here "business" cannot mean "prospective" business). If Congress had intended to give standing to bring private treble damage actions to persons who did not actually have a business but simply an "intention" to engage in such a business, Congress would not have included these words of limitation in section 4. *See Hawaii v. Standard Oil Co. of California,* 405 U.S. 251 (1972) (fact that "business or property" requirement is contained in §4 but not §16 shows congressional intent to limit treble damage, as opposed to injunctive, antitrust actions, to those persons actually injured in business or property).

In *Hawaii v. Standard Oil Co. of California, supra,* this Court construed the words "business or property"

contained in section 4 in holding that a state cannot sue for injury to its "general economy" because such an injury is not an injury to "business or property" within the meaning of section 4. In so holding the Court stated:

> "Like the lower courts that have considered the meaning of the words 'business or property,' we conclude that they refer to commercial interests or enterprises. See, *e.g.*, Roseland v. Phister Mfg. Co., 125 F.2d 417 (CA7 1942); Hamman v. United States, 267 F.Supp. 420 (Mont. 1967), appeal dismissed, 399 F.2d 673 (CA9 1968); Broadcasters, Inc. v. Morristown Broadcasting Corp., 185 F.Supp. 641 (NJ 1960)." 405 U.S. at 264.

Certainly, a "prospective purchaser" of a business does not have a "commercial interest or enterprise". In fact, in *Broadcasters, Inc. v. Morristown Broadcasting Corp.*, 185 F.Supp. 641 (D. N.J. 1960), one of the above cases cited with approval by this Court, the plaintiff was attempting to engage in the radio broadcast business, had applied to the Federal Communications Commission for a license but was allegedly thwarted in its attempts by the anticompetitive acts of defendants. In holding that the plaintiff did not have standing under section 4, the district court stated:

> "The term 'business or property' is used in the ordinary sense and denotes a commercial venture or enterprise. Peller v. International Boxing Club, 7 Cir., 227 F.2d 593, 595 and 595; Image & Sound Service Corp. v. Altec Service Corp., D.C., 149 F.Supp. 237, 239; Brownlee v. Malco Theatres, D.C., 99 F.Supp. 312, 316 and 317. The

> plaintiffs were not engaged in a commercial venture or enterprise at the time this suit was brought; they entertained nothing more than an expectation that they would be so engaged if the license were granted. Ibid." *Broadcasters, Inc. v. Morristown Broadcasting Corp., supra,* 185 F.Supp. at 644.*

Thus, this Court's reading of the "business or property" requirement contained in section 4 in *Hawaii v. Standard Oil Co. of California, supra,* was, in part, based upon and is certainly consistent with those decisions of lower courts which have denied standing to a plaintiff who did not have an actual business but only a desire and intention to engage in one. The decision of the Court of Appeals is inconsistent with that reading and constitutes a substantial and unwarranted extension of the standing requirements of section 4.

2. The Decision of the Court of Appeals Is Inconsistent With the Decisions of This Court in Illinois Brick Co. v. Illinois and Hawaii v. Standard Oil Co. of California in That It Would Sanction Duplicative Recoveries in a Treble Damage Antitrust Action.

In all of the "intention and preparedness" test cases cited by the Court of Appeals in support of its decision (586 F.2d at 1309-10 & 1310 n.4; Appendix at A-9), the plaintiffs were either (1) actually engaged in busi-

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*Both *Peller v. International Boxing Club,* 227 F.2d 593 (7th Cir. 1955) and *Brownlee v. Malco Theatres,* 99 F.Supp. 312 (W.D. Ark. 1951), cited by the court in *Broadcasters, Inc. v. Morristown Broadcasting Corp., supra,* are cases denying standing to plaintiffs who intended to engage in but had not yet actually engaged in a "business".

ness but attempting to expand into new markets or (2) attempting to establish an altogether new business. The clear rationale of those courts in holding that such a plaintiff may have standing to sue under section 4 of the Clayton Act is that to do otherwise would allow defendants to foreclose a particular market to potential competitors through unlawful combinations or creation of other "barriers to entry" to businesses attempting to enter that market. If those plaintiffs were not given standing to bring the alleged antitrust claims there could be no private claims brought.

The Court of Appeals, however, held that a prospective purchaser of an *already existing* business which was itself the target of purported antitrust violations could sue for treble damages for loss to him of the anticipated profits he would have obtained if he had purchased that business. Thus, unlike the other intention and preparedness cases, plaintiff in this action is not the one and only plaintiff who could have standing to assert the claims alleged in the complaint but rather is only one of at least two (and conceivably more) potential plaintiffs with such claims. Obviously, IMS, the existing business, itself has standing to assert claims for damages in the form of its lost profits by reason of the alleged anticompetitive acts of defendants. Moreover, under the test enunciated by the Court of Appeals, there is no reason why there could not be other "prospective purchasers" of IMS who would also have standing to sue for lost anticipated profits they suffered. It is obvious, therefore, that the rationale of the courts in applying the intention and preparedness doctrine to plaintiffs with existing businesses attempting to enter a new market or to plaintiffs which are wholly new potential competitors is not applicable here.

Much more importantly, however, the decision of the Court of Appeals is in direct conflict with the decisions of this Court in *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977) and *Hawaii v. Standard Oil Co. of California,* 405 U.S. 251 (1972). Those cases both held that theories of standing under section 4 of the Clayton Act which could open the door to duplicative recoveries were not intended by Congress and would not be sanctioned.

In *Illinois Brick Co. v. Illinois, supra,* this Court rejected plaintiffs' contention that they had standing under section 4 of the Clayton Act to sue manufacturers of concrete blocks who had allegedly engaged in a price fixing conspiracy where the illegally high prices were "passed on" to plaintiffs through plaintiffs' suppliers. In rejecting this claim, the Court reiterated the unwillingness expressed in *Hawaii v. Standard Oil Co. of California, supra,* to open the door to duplicative recoveries in cases brought under section 4 of the Clayton Act. 431 U.S. at 731. In reaching this conclusion, this Court again rejected the argument that the danger of duplicative recoveries could be avoided through the use of various procedural devices and the apportionment of damages among the various potential claimants. 431 U.S. at 731 n.11.

There can be no doubt that the decision of the Court of Appeals to allow Solinger to sue for damages for the lost anticipated profits he would have obtained had he purchased IMS would sanction duplicative recoveries. IMS itself certainly has standing to sue for those *same* lost profits as does any other person who was a "prospective purchaser" of IMS. Thus, the decision of the Court of Appeals is in clear conflict

with the decisions of this Court which require avoidance of duplicative recoveries.

Additionally, it should be noted that the decision of the Court of Appeals is also in conflict with this Court's holding in *Brunswick Corp. v. Pueblo Bowl-O'Mat*, 429 U.S. 477 (1977), that treble damage antitrust actions can only be maintained where the plaintiff can prove an injury of the type the antitrust laws were intended to prevent. 429 U.S. at 489. As the district court noted, Solinger's claims, even if proven, are not antitrust claims but some type of state claim which should be resolved in his pending state court action.

3. The Decision Below Raises Significant and Recurring Problems, About Which Lower Courts Are in Conflict, Concerning Whether Standing to Sue Under Section 4 of the Clayton Act Is a Question of Law or a Question of Fact.

The Court of Appeals held that Solinger's standing claim insofar as it relates to the "business or property" requirement is a question of fact for the jury. This holding is in conflict with other decisions of the Ninth Circuit Court of Appeals which have held, without limitation, that standing is a question of law for the court. *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 199 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974) ("The question of standing is a question of law for the court."); *see also, Bosse v. Crowell Collier and MacMillan*, 565 F.2d 602, 607 (9th Cir. 1977); *John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495, 498 (9th Cir. 1977). The Court of Appeals characterized these other Ninth Circuit decisions as holding that the "causation" element of stand-

ing is a question of law but the remaining elements are questions of fact. This characterization is incorrect. *See In re Western Liquid Asphalt Cases, supra,* 487 F.2d at 199 ("The question of standing is a question of law for the court. . . . On the other hand, the problems of damages and causation are questions of fact for the jury.").

Several other courts have also held that standing under section 4 is a question of law. *Juneau Square Corp. v. First Wisconsin Nat. Bank,* 445 F.Supp. 965, 968-69 (E.D. Wis. 1978); *Bywater v. Matshushita Electric Industrial Co., Ltd.,* 1971 Trade Cas. ¶73,759 at 91,202 (S.D.N.Y. 1971); *cf. Moorehead v. General Motors Corp.,* 442 F.Supp. 873, 877 (E.D. Pa. 1977). *See also Hawaii v. Standard Oil Co. of California,* 301 F.Supp. 982, 985 (D. Hawaii 1969), *rev'd,* 431 F.2d 1282 (9th Cir. 1970), *aff'd,* 405 U.S. 251 (1972) (The district court treated standing as a question of law, as did the Ninth Circuit Court of Appeals and this Court). On the other hand, a few other lower courts apparently concur with the decision of the Court of Appeals that standing, at least in some contexts, is a question of fact. *See, e.g., Hecht v. Pro-Football, Inc.,* 570 F.2d 982, 993-95 (D.C. Cir. 1977), *cert. denied,* ..... U.S. ....., 98 S.Ct. 3069 (1978).

This is an important question calling for resolution by this Court. Inasmuch as standing is a preliminary issue that often could be determined by the court before the lengthy and expensive process of preparing for trial and trying complicated antitrust cases, petitioners contend that this Court should rule in accordance with those lower courts which have held that standing to sue under section 4 of the Clayton Act

is a question of law that may be determined by the trial court. The decision of the Court of Appeals will result in the further complication of already complex antitrust cases by adding to those issues before the jury for determination, the issue of whether plaintiff satisfies the elements of the "intention and preparedness" test. Petitioners submit that the issue of whether a plaintiff has "business or property" within the meaning of section 4 of the Clayton Act is an issue of law particularly appropriate for judicial determination.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals.

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APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

Jack Solinger, Plaintiff-Appellant, v. A&M Records, Inc., Transamerica Corp., United Artists Corp., United Artists Records, Inc., Eric-Mainland Distributing Co., Musical Isle of America, Record Merchandising Company, Inc., Jerome S. Moss, Robert Fead, Sidney Talmadge, Motown Record Corporation, Defendants-Appellees. No. 76-2965.

Nov. 27, 1978.

Before BARNES, TRASK and HUG, Circuit Judges.

BARNES, Senior Circuit Judge:

This is an appeal from a district court judgment dismissing a private antitrust action brought under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and sections 4 and 7 of the Clayton Act, 15 U.S.C. §§ 15 and 18 on the ground that the plaintiff lacked standing to sue for damages under section 4 of the Clayton Act.

I

Jack Solinger, the former president and general manager of Independent Music Sales, Inc. (I.M.S.), an independent distributor of phonographic records and tape recordings, by an original and an amended complaint, sued A&M Records, Inc. (A&M) and Motown Record Corporation (Motown) for damages arising from alleged antitrust violations, including a territorial

allocation scheme. Solinger in his original complaint, had sued Transamerica Corporation for violating section 7 of the Clayton Act and section 2 of the Sherman Act. He alleged that Transamerica engaged in improper corporate mergers and consolidations, stock acquisitions, and acquisitions of corporate assets. He further alleged that these acquisitions of manufacturers, including defendant United Artists, and distributors, including defendants United Artists Records, Inc., Eric-Mainland, Musical Isle of America, Record Merchandising Co., Inc., and individually named officers thereof, Moss, Fead and Talmadge, resulted in a direct lessening of competition in the record distribution industry.

Until March 1973, I.M.S. was the principal independent distributor of phonographic records and tape recordings in northern California and acted as the distributor for defendants A&M and Motown, two large manufacturers of records and tape recordings.[1] As a distributor for these companies, I.M.S. principally serviced northern California, but also sold A&M and Motown products to certain retail accounts in southern California. The latter named area, however, was primarily serviced for A&M and Motown by another distributor, Record Merchandising Company.

In 1972 and 1973, Solinger negotiated on his own behalf to purchase I.M.S from its sole shareholder, Zenith Distributing Company. He obtained financing,

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[1]By 1973 A&M and Motown were ranked as the fourth and fifth largest record manufacturers in the popular music field.

and negotiated both a written but unsigned purchase agreement, and a written but unsigned "Rental and Service Agreement" from Zenith. The purchase was to be made by J.N.S. Enterprises, an entity Solinger intended to create for that purpose.

Before signing the final papers, Solinger contacted both A&M and Motown to determine whether they would retain I.M.S. as their distributor after such a purchase. Both companies indicated that they would *not* retain I.M.S. Solinger contends that he did not complete the purchase of I.M.S. because I.M.S. could not survive without the A&M and Motown contracts. Shortly thereafter, both companies terminated I.M.S. as a distributor and without these two contracts, I.M.S. went out of business.

Solinger alleges that A&M and Motown refused to deal with him and with I.M.S. because, pursuant to his specific directions as president, I.M.S. had refused to comply with a territorial allocation plan established by A&M and Motown under which northern and southern California were divided into two separate territories. Solinger also alleges that after A&M and Motown terminated their distribution agreements with I.M.S., Eric-Mainland Distributing Company became the distributor for both A&M and Motown products for northern California and began to comply with a territorial allocation plan under which it would not sell A&M and Motown products in southern California.

II

The district court granted Motown's motion to dismiss Solinger's complaint (as to Motown alone) on the ground that the complaint failed to state a claim upon which relief could be granted. Thereupon all other defendants filed similar motions. The court filed a final judgment in favor of all defendants on June 29, 1976, stating only that "the action be, and hereby is dismissed." Although the grounds for dismissal were not stated in the order, the court indicated that "basically" the plaintiff lacked standing.[2]

Under Fed.R.Civ.P. 12(b)(6), however, if there is a motion to dismiss for failure to state a claim upon which relief can be granted, and matters outside the pleadings are presented to and not excluded but are heard by the court, the motion is to be treated as one for summary judgment and disposed of as provided in Fed.R.Civ.P. 56, and particularly 56(c) thereof. Because material outside the pleadings was presented in this case, the judgment must be held to be one

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[2]On June 25, 1978 counsel raised the question of the *form* of the orders proposed by the moving parties:

> MR. McKENZIE [Attorney for plaintiff]: That order [presented on behalf of Transamerica Corporation, et al.] recites that the Court lacks subject matter jurisdiction over the action. I understand Your Honor's ruling today, you simply hold that we haven't brought ourselves within the standing provision, which is 15 U.S.C. § 15. I think the form of this order goes way beyond that. Therefore I don't think this is a proper form of order.
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> THE COURT: It is basically standing.
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> * * *
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> THE COURT: For the record it's on standing.

for summary judgment. *Dorado v. Kerr,* 454 F.2d 892, 896 (9th Cir. 1972).

It is elementary that the district court before granting summary judgment must determine that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Baldwin v. Redwood City,* 540 F.2d 1360 (9th Cir. 1976); *Great Western Bank & Trust v. Kotz,* 532 F.2d 1252, 1254 (9th Cir. 1976); *Zweig v. Hearst Corp.,* 521 F.2d 1129, 1133 (9th Cir.), *cert. denied,* 423 U.S. 1025, 96 S.Ct. 469, 46 L.Ed.2d 399 (1975). When no finding is made by the court specifying with particularity what material facts have been established, and without a finding that no material factual issues remain, there is no way in which a reviewing court can pass upon the merits of the controversy when the judgment is appealed. We have no power to judge the fact issue de novo. *Hycon Manufacturing Co. v. H. Koch & Sons,* 219 F.2d 353, 355 (9th Cir.), *cert. denied,* 349 U.S. 953, 75 S.Ct. 881, 99 L.Ed. 1278 (1958).

Because we are required to review this case as one for summary judgment, and because the court failed to determine whether any genuine issues of material fact exist and whether the plaintiff is entitled to judgment as a matter of law, we remand part of the case to the district court for further proceedings to determine what the undisputed facts are, and that no material factual issues remain; and, if that be true,

whether Solinger has standing. As discussed in the remainder of this opinion, we affirm as a matter of law the district court's determination that plaintiff does not have standing to pursue his claim under section 7 of the Clayton Act.

III

Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976) provides a private cause of action for those parties injured by antitrust violations such as the ones alleged by Solinger in his complaint: violations of sections 1 and 2 of the Sherman Act and sections 4 and 7 of the Clayton Act, 15 U.S.C. §§ 1, 2, 15 and 18. Section 4 provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including reasonable attorney's fee.

15 U.S.C. § 15. Despite the broad language of this provision, the parties entitled to recover under this section have been greatly limited through judicially created restrictions on standing. *See generally* L. Sullivan, *Handbook of the Law of Antitrust* § 247, at 770 (1977); Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L.J. 809 (1977);

Lytle & Purdue, *Antitrust Target Area Under Section 4 of the Alleged Antitrust Violation,* 25 Am.U.L.Rev. 795 (1976).

In order to have standing under section 4 the plaintiff must allege nonconclusory facts establishing that there has been injury to the plaintiff's business or property and that the injury to the plaintiff's business or property occurred "by reason of" the antitrust violation. The plaintiff's claim may be dismissed for lack of standing as a matter of law, *John Lenore & Co. v. Olympia Brewing Co.,* 550 F.2d 495, 500 (9th Cir. 1977), where there is an insufficient showing of causation. However, if the plaintiff states sufficient facts to support his allegations that an antitrust violation has occurred and that he has sustained injury to his business or property, he is generally entitled to go to the jury on the violation and injury issues. These two determinations, unlike causation, are not questions of law; they are questions of fact. *See Woods Exploration & Producing Co. v. Aluminum Co. of America,* 438 F.2d 1286 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972), *aff'd after retrial,* 509 F.2d 784 (5th Cir.), *cert. denied,* 423 U.S. 833, 96 S.Ct. 59, 46 L.Ed.2d 52 (1975) (whether plaintiff is a prospective purchaser is a question of fact for the jury); *Pacific Seafarers, Inc. v. Pacific Far East Line,* 48 F.R.D. 347, 351 (D.D.C.1969) (determination on motion to dismiss is only whether the pleadings present a triable antitrust issue and show the requisite causation).

IV

As stated above, Solinger alleges in his complaint that the defendants committed actions that violate sections 1 and 2 of the Sherman Act and sections 4

and 7 of the Clayton Act, 15 U.S.C. §§ 1, 2, 15 and 18. This Court determines that Solinger has made a sufficient showing of antitrust violations in his complaint to survive a motion to dismiss, in view of the fact that we must take the allegations of the complaint as true. Upon remand the district court should consider whether antitrust violations have occurred, whether there are genuine issues of material fact remaining, and, if not, whether either party is entitled to judgment as a matter of law.[3] We do note, however, that summary judgment is not generally considered to be an appropriate remedy in a case involving antitrust violations because such claims usually involve extensive factual determinations. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 500, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1967).

V

To have standing, Solinger must also show that he has sustained injury to his business or property. In this case Solinger was a prospective purchaser of a business. Some courts have held that a prospective purchaser may not recover under section 4 because the amount of damage sustained is not sufficiently ascertainable, and thus the plaintiff has not suffered tangible injury to his business or property. *E. g., Duff v. Kansas City Star Co.*, 299 F.2d 320, 323 (8th Cir. 1962), *see generally* L. Sullivan, *Handbook of the Law of Antitrust*, § 247 at 770 (1977). We disagree, however, and adopt the view that a prospective

[3]In part VI of this opinion, we hold that plaintiff does not have standing as a matter of law to pursue his section 7 claim. It will therefore be unnecessary for the district court to determine whether summary judgment should be granted as to the section 7 violation.

purchaser who has taken substantial demonstrable steps to enter an industry and who is thwarted in that purpose by antitrust violations, has suffered a possible ascertainable loss.

In making its determination whether the plaintiff is a prospective purchaser, we suggest that the district court should consider the approach adopted in *Waldron v. British Petroleum Co.*, 231 F.Supp. 72 (S.D.N.Y. 1964). In *Waldron*, the court had to determine whether the plaintiff (who had a written option *contract* to purchase Iranian oil), met the standing requirements of section 4. In analyzing whether the plaintiff had suffered the necessary injury to "business or property" the court summarized the case law in the various circuits as follows:

> In determining whether a plaintiff has proved the requisite intention and preparedness, the courts have looked for *varying combinations* of the following typical elements:
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> 1. The background and experience of plaintiff in his prospective business . .
>
> 2. Affirmative action on the part of plaintiff to engage in the proposed business . . .
>
> 3. The ability of plaintiff to finance the business and the purchase of equipment and facilities necessary to engage in the business . . .
>
> 4. The consummation of contracts by plaintiff . . .

Id. at 81-82 (citations omitted; emphasis supplied).[4]

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[4]For other cases using the intention and preparedness test, *see Hecht v. Pro-Football, Inc.*, 187 U.S.App.D.C. 73, 570 F.2d 982 (1976); *Quinonez v. National Assoc. of Securities Dealers, Inc.*, 540 F.2d 824 (5th Cir. 1976); *Woods Exploration & Producing Co., Inc. v. Aluminum Co.*, 438 F.2d 1286 (5th Cir. 1971).

We, of course, take no position on the question whether Solinger can support a factual determination that he met the requirements of the intention and preparedness test under the facts of this case. We simply remand the case to the district court for a determination whether summary judgment is appropriate on this issue and again note that the issue whether the plaintiff is a prospective purchaser is factual in nature and seldom presents a situation appropriate for a determination by summary judgment.

VI

The third element that Solinger must show in order to sustain a claim under section 4 is that the loss to his business or property was caused by the alleged antitrust violation. The injury caused by the violation must be one the antitrust laws were designed to protect against. *Brunswick Corp. v. Pueblo Bowl-O-Mat,* 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). *Cf.* Handler, Changing Trends in Antitrust Doctrines, 77 Columbia L.Rev. 979, 989 to 993.

This Court has generally used the target area approach in order to determine whether a given plaintiff has satisfied the causation element of standing.[5] *Bosse*

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[5]The courts have used three different methods in order to determine whether a given plaintiff has satisfied the causation element: the target area approach, the direct injury approach, and the zone of interests approach, the latter of which was recently followed in *Malamud v. Sinclair Oil Corp.,* 521 F.2d 1142 (6th Cir. 1975). We have not commented on the zone of interests approach but we have criticized the direct injury test:

> [I]f the claimant is separated from the violator by an intermediate antitrust victim, standing is denied by attaching conclusory labels such as "remote", "indirect", and "consequential". Resurrecting notions of privity, this test thus arbitrarily forecloses otherwise meritorious claims

v. Crowell, Collier & Macmillan, 565 F.2d 602 (9th Cir. 1977); *John Lenore & Co. v. Olympia Brewing Co.,* 550 F.2d 495 (9th Cir. 1977); *In re Western Liquid Asphalt Cases,* 487 F.2d 191 (9th Cir. 1973); *In re Multidistrict Vehicle Air Pollution,* 481 F.2d 122, 129 (9th Cir.), *cert. denied,* 414 U.S. 1045, 94 S.Ct. 551, 38 L.Ed.2d 336 (1973). Under the target area approach the plaintiff must show that he is within the area of the economy that is endangered by a breakdown of competitive conditions. *Conference of Studio Unions v. Loew's, Inc.,* 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied,* 342 U.S. 919, 72 S.Ct. 367, 96 L.Ed. 687 (1952).

Solinger alleged that he has standing to pursue his claims under section 1 and 2 both as a prospective purchaser of I.M.S. and as an employee of that company. He argues that he has standing to recover damages under section 1 of the Sherman Act because of the territorial restrictions imposed by A&M and Motown and under section 2 of the Sherman Act because of the territorial restrictions imposed by A&M and Motown and under section 2 of the Sherman Act because of a series of direct and indirect acquisitions by defendant Transamerica Corporation.

In order to have standing under section 4 when the plaintiff has alleged violations of sections 1 and 2, Solinger must show that the injury occurred within an area of the economy that foreseeably would have

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simply because another antitrust victim interfaces the relationship between the claimant and the alleged violator. *In re Multidistrict Vehicle Air Pollution,* 481 F.2d 122, 127 (9th Cir.), *cert. denied,* 414 U.S. 1045, 94 S.Ct. 551, 38 L.Ed.2d 336 (1973). *Compare:* Sherman, Antitrust Standing: From *Loeb* to *Malamind,* 51 N.Y.U.L.Rev. 375; Conclusion, 405 to 407 (1976).

been affected by the antitrust violation alleged. *See, e.g., In re Western Liquid Asphalt Cases,* 487 F.2d 191, 199 (9th Cir. 1973), *cert. denied,* 415 U.S. 919, 94 S.Ct. 1419, 39 L.Ed.2d 474 (1974) (indirect purchaser in the chain of distribution foreseeably injured by price-fixing conspiracy); *Twentieth Century Fox Film Corp. v. Goldwyn,* 328 F.2d 190, 220 (9th Cir.), *cert. denied,* 379 U.S. 880, 85 S.Ct. 143, 13 L.Ed.2d 87 (1964) (held that the plaintiff was within the area of the economy that the defendant could reasonably have foreseen would be affected by the alleged antitrust violations); *Hoopes v. Union Oil Co.,* 374 F.2d 480 (9th Cir. 1967) (lessee's interest in certain property sufficient to allow lessee standing to sue for alleged antitrust violations, despite the fact that the lessor could also have sued, because it was foreseeable that the lessee's interest would be affected).[6]

If Solinger can support a factual determination that he was a prospective purchaser of I.M.S., he almost certainly has standing to pursue a claim against A&M and Motown for any territorial restriction that violates section 1 of the Sherman Act. As a prospective purchaser of a company and a potential new entrant into the market, Solinger allegedly has been foreclosed from entering the market because of A&M's and Motown's anticompetitive refusal to deal with him.[7] He

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[6]This Court did not use the foreseeability approach in *In re Multidistrict Vehicle Air Pollution,* 481 F.2d 122, 129 (9th Cir.), *cert. denied,* 414 U.S. 1045, 94 S.Ct. 551, 38 L.Ed.2d 336 (1975) (farmer did not have standing to sue for damages because of automotive antipollution devices, no discussion of foreseeability). However, the court again used a foreseeability test in *Blankenship v. Hearst Corp.,* 519 F.2d 418 (9th Cir. 1975).

[7]A territorial restraint is "a promise by a buyer that he will not sell the goods outside a specified area or to customers

is within the area of the economy that the defendants should have foreseen would be affected by their violation of the antitrust laws, if any. *In re Multidistrict Vehicle Air Pollution,* 481 F.2d 122, 129 (9th Cir. 1973).

As a prospective purchaser Solinger is also entitled to pursue his claim against Transamerica Corporation under section 2 of the Sherman Act if its acquisitions caused unreasonable barriers to entry. As a potential entrant to the market, Solinger would be within the area of the economy that Transamerica should have foreseen would be affected by proof of its alleged violation of the antitrust laws.

Solinger does not, however, have standing in his capacity as an *employee* of I.M.S. to pursue his claims under section 1. He is not within the area of the economy that the antitrust laws were designed to protect. *See Brunswick Corp. v. Pueblo Bowl-O-Mat,* 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977).[8]

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who reside or have their place of business outside of that area." Note, Restricted Channels of Distribution under the Sherman Act. 75 Harv.L.Rev. 795, 796 (1962). And see: *Continental T.V., Inc. v. GTE-Sylvania, Inc.,* 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977), overruling *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967), *Id.* 433 U.S. 58, 97 S.Ct. 2549. Sylvania "stands in sharp contrast to the *per se* attitudes in *United States v. Topco Associates, Inc.,* 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972), and *Albrecht v. Herald Co.,* 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968)" Handler, Changing Trends in Antitrust Doctrines, 75 Columbia L.Rev. 979, 980-988 (1977).

[8]Shareholders, officers, and employees of corporations are generally denied standing to sue. *Vincel v. White Motor Corp.,* 521 F.2d 1113 (2d Cir. 1975); *Ash v. International Business Machines, Inc.,* 353 F.2d 491 (3d Cir.), *cert. denied,* 384 U.S. 927, 86 S.Ct. 1446, 16 L.Ed.2d 531 (1975). Note, Sylvania and Vertical Restraints on Distribution, 19 Boston College L.Rev. 751.

His loss of salary was merely incidental to the alleged antitrust violation and was not within the area of the economy that the defendants should have foreseen would be affected by its violation.

A different causation test exists in order to show standing under section 4 of the Clayton Act when a section 7 violation is alleged.[9] The plaintiff must be a "component of the competitive infrastructure" or a "component of competitive significance." *Bosse*

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[9]Although this Court has not so stated, the threshold causation inquiry of the target area test has varied depending upon the type of antitrust violation that is alleged to have caused injury to the plaintiff. In cases in which a section 1 or 2 violation is alleged, the test is whether the antitrust violation is clearly within the area of the economy that the defendants should have or did foresee would be endangered by the breakdown of competitive conditions. *Blankenship v. Hearst Corp.*, 519 F.2d 418 (9th Cir. 1975); *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 220 (9th Cir.), *cert. denied*, 379 U.S. 880, 85 S.Ct. 143, 13 L.Ed.2d 87 (1969); *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919, 72 S.Ct. 367, 96 L.Ed. 687 (1952). When a section 7 violation is alleged, however, the plaintiff must be a "component of the competitive infrastructure" or a "component of competitive significance." *Bosse v. Crowell, Collier & Macmillan*, 565 F.2d 602, 607 (9th Cir. 1977) (citing *John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495, 500 (9th Cir. 1977)). The difference is logical. An antitrust violation occurs under section 7 of the Clayton Act if there is a merger or acquisition that causes substantial lessening of competition or a tendency to monopoly "in any line of commerce in any section of the country." 15 U.S.C. § 18 (1976). Before a private party can be injured directly by the type of violation section 7 was designed to prevent, the party must be an existing competitor in the relevant market. Although others may feel tangential effects of lessening competition, such as raised prices or limited supply, the only immediate injury caused by an illegal merger or acquisition is a lessening of competition and only a competitor could be directly affected. The test for standing that this Court has used for a section 7 violation is designed to allow only those parties who are injured directly to sue. Thus, the statement that a party must be a member of the competitive infrastructure is simply another way of saying that only a competitor within

v. Crowell, Collier & Macmillan, 565 F.2d 602, 607 (9th Cir. 1977) (citing *John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495, 500 (9th Cir. 1977)).

In this case Solinger is not a "member of the competitive infrastructure" or a "component of competitive significance" either in his capacity as a prospective purchaser or in his capacity as an employee. He has no standing as a matter of law to pursue his claim under section 7 and the district court's dismissal of this portion of the complaint was proper.

Affirmed in part, reversed in part, and remanded in part.

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a given market can be injured by a given merger or acquisition and only those parties should have standing to sue.

When a section 1 violation is alleged, however, the scope of parties who can be directly injured by an action that "the antitrust laws are designed to prevent" is much broader. It is not only the competitor who is directly injured. Under section 1 of the Sherman Act "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1976). The most obvious examples of parties who are not competitors but who are affected by section 1 antitrust violations are those who feel the effects of a secondary boycott and potential competitors who are attempting to enter the market but who are precluded from doing so because of barriers to entry. Individual consumers may be directly affected by an illegal tying arrangement.

Because a party other than a competitor who alleged a section 1 or 2 violation may be within the area of the economy that the antitrust laws are designed to protect, this Court has formulated another test for standing. As discussed in this opinion, the test is foreseeability.

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